

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
CRIMINAL ACTION NO. 5:06-CR-00022-KDB-DSC**

UNITED STATES OF AMERICA,

Plaintiff,

v.

WAYNE DONTA O'NEIL,

Defendant.

ORDER

THIS MATTER is before the Court on Defendant's Motion to Reduce Sentence Pursuant to Rule 35(b) (Doc. No. 792); Motion for Specific Performance (Doc. No. 795); Motion for Hearing (Doc. No. 842); and Motion to Compel/Motion Pursuant to Writ of Mandamus to Move this Court in Resolving a Factual Matter (Doc. No. 901).

Defendant argues that in exchange for his guilty plea and cooperating with local law enforcement, he was promised that the government would file a Rule 35 motion. In his motions, Defendant asks the Court to compel the government to file a Rule 35(b) motion and/or require a hearing to discuss why the government did not file a Rule 35(b) motion.

Federal Rule of Criminal Procedure Rule 35(b) permits a court, upon the government's motion, to impose a new, reduced sentence that takes into account post-sentencing substantial assistance. It is well-settled that whether to file a Rule 35(b) motion is a matter left to the government's discretion. *United States v. Dixon*, 998 F.2d 228, 230 (4th Cir. 1993). In the absence of a motion by the government, a court may grant a downward departure only if (1) the government has obligated itself in a plea agreement to move for such a departure, or (2) unless, in the absence of such an obligation, it is shown that the government's refusal or failure so to move was based on

an unconstitutional motive. *United States v. Davis*, 308 Fed. Appx. 677, 677-78 (4th Cir. 2009) (per curiam) (unpublished); *United States v. Wallace*, 22 F.3d 84, 87 (4th Cir. 1994) (citing *Wade v. United States*, 504 U.S. 181 (1992)).

Nothing in Defendant's plea agreement shows that the government obligated itself to move for a downward departure. (Doc. No. 270: Plea Agreement, ¶ 7e, 23). Moreover, there is no evidence that the government's refusal to file a Rule 35(b) motion was based on an unconstitutional motive. Defendant's motions indicate that his assistance to the government occurred before he was sentenced. In a letter to Defendant from the United States Attorney's Office, Defendant was informed that he was not eligible for a Rule 35 Downward Departure. The letter stated:

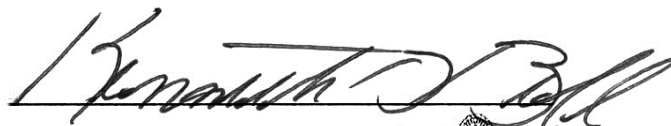
This is to inform you that you are not eligible for a Rule 35 Downward Departure. As you know, Rule 35's are available in the discretion of the U.S. Attorney's Office, when a defendant provides substantial assistance to the United States after he has been sentenced. Your cooperation in [Assistant United States Attorney] Jill Rose's case pre-dated your sentencing. Therefore, you are ineligible for a Rule 35 Motion.

(Doc. No. 795, at 9). Accordingly, Defendant's motions are denied.

IT IS THEREFORE ORDERED that Defendant's Motion to Reduce Sentence Pursuant to Rule 35(b) (Doc. No. 792), Motion for Specific Performance (Doc. No. 795), Motion for Hearing (Doc. No. 842), and Motion to Compel/Motion Pursuant to Writ of Mandamus to Move this Court in Resolving a Factual Matter (Doc. No. 901) are **DENIED**.

SO ORDERED.

Signed: February 4, 2020



Kenneth D. Bell
United States District Judge

